Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

DONNA FRED,

Petitioner,

WACKENHUT CORPORATION AND
OMAHA PUBLIC POWER DISTRICT,

Respondents.

Petition For Writ Of Certiorari To The U. S. Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Has the Eighth Circuit's finding that the trial court made no errors of law or fact so far departed from the accepted and usual course of judicial proceedings, or has it sanctioned such a departure by the lower court, as to call for an exercise of the Supreme Court's power of supervision?

II.

May the Respondents as a matter of law rely on the Petitioner's alleged conduct or mental state as the basis for their decisions to suspend and terminate her when the conduct or mental state, if any, clearly would not have occurred but for the allegations of sexual harassment brought by Petitioner and where the sexual harassment was known to the Respondents, but not remedied?

III.

Can Respondents be said to have taken prompt, effective and remedial action when their response to Petitioner's complaints of a sexually hostile environment brought by Petitioner was to deny her a transfer; to place the solution to the problem in her hands; to formally discipline her; to suspend her pending an investigation into her complaints; to force her to submit psychological evaluations; to accuse her of being mentally unfit for duty; and then to terminate her?

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Petitioner, Donna Fred, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered on May 4,1995.

OPINIONS BELOW

After a trial before the court, the district court rendered a judgment and issued its Memorandum Opinion on August 15,1994. (App. A). The Eighth Circuit Court of Appeals affirmed the judgment of the district court without opinion on May 4, 1995 (App. B), and Judgment was entered on May 4, 1995. (App. C).

JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment of the Eighth Circuit Court of Appeals entered on May 4, 1995. This Court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case was brought alleging a sexually hostile environment and wrongful termination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et al. ("Title VII"). The particular statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...., sex,.....

42 U.S.C. Sec. 2000e-2(a) [Title VII].

> It shall be an unlawful employment practice for an employer to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed a practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in an manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. Sec. 2000e-3(a) [Title VII].

STATEMENT OF THE CASE

Respondent Wackenhut (TWC) was contracted to provide nuclear security officers for the Respondent Omaha Public Power District (OPPD) at the Fort Calhoun Nuclear Power Station. Petitioner came highly qualified and was personally recommended to Wackenhut's off site supervisor, Larry Jones, for the job. At trial Mr. Jones testified Petitioner was exactly what he was looking for. After passing an MMPI exam, a physical exam, and a background check, Petitioner was certified as being mentally and physically capable of performing the duties of an armed Nuclear Security Officer on January 30, 1989. On February 5, 1989 Petitioner was hired by Wackenhut for the position of Nuclear Security Officer at the Ft. Calhoun Station. During her interview with Mr. Jones, a male applicant was told to hurry up and get his paper work handed in or Petitioner would be promoted before him. When questioned about how the applicant felt about that he indicated he would be willing to work along side Petitioner, to which Jones responded by saying he could handle that.

Petitioner began training in radiation protection, the handling of fire arms, fire protection, the use of a gas mask and other protective gear, and in conducting foot patrols and hostage negotiations on February 5, 1989. The training was accelerated because the Station was going on line on March 5, 1989. Fred passed her training courses and was certified to begin work when the Station went on line. She was assigned to a team consisting of herself and 16 male officers. Once on duty Petitioner was subject to a dual chain of command consisting of OPPD and TWC officers.

During the training period, Petitioner had to complain to those in charge that the men in her group were guilty of horse play and of making a lot of noise which was preventing her from being able to concentrate on her studies. In response the noise was made worse. Petitioner was at one time referred to as "old lady" by her weapons instructor. In order to complete her training, Petitioner had to retake the NGET exam one time, however, this was allowed and others were required to do the same.

Upon completing the NGET exam, Petitioner returned to her team members who were completing their training on locating the many doors within the Station. One of her team members had to be

ordered to help her complete her orientation as to the doors since no one would volunteer for the job.

Upon beginning her duties, Petitioner began to have difficulty locating the doors. As a result Petitioner asked for some additional training. Because of this her team members gave her a hard time, despite the fact that she did not really have any more trouble then they did. In order to obtain the additional training on locating the doors, Petitioner was decertified on March 8, 1989. In addition to the decertification, Petitioner's rate of pay was reduced to training pay. She complained about this since she did not feel it was right when her team members were also in training during much of this time and were still receiving full pay. In response to her complaint she was told by Mr. Jones that there is no such think as being half pregnant.

From March 8, 1989 to March 17, 1989 Petitioner was assigned perimeter post duties as opposed to foot patrol assignments which would have required she go inside the Station. While on perimeter post assignments, Petitioner and her team members were provided intercoms so that they could chat with each other and stay alert. Petitioner complained during this period of time to both OPPD and TWC supervisors about what she perceived as being degrading conversations about women being conducted over the intercoms. These conversations consisted of statements about women giving head to the boss, what the men would like to do to a particular woman, innuendoes about sexual acts including squeaky chairs, and general conversations about different woman's body parts. Although OPPD took no action in response to her complaints, TWC's Mr. Jones issued an Employee Bulletin dated March 13, 1989 condemning the use of such language over the intercoms. Despite this warning, similar conversation continued. For example, another female officer was referred to as "anaconda woman" while her relationship with another officer was being discussed. Petitioner described the communications as showing in general a show of disrespect toward woman. At one point in time, Petitioner was told by one of her team members that where he came from "woman were second class citizens," and then asked her opinion on the subject.

On March 17, 1989 Petitioner was recertified after completing a timed test on the doors. When she returned to her team members she was not congratulated, but instead handed a Styrofoam

cup with the statement "suck my dick Ma-Donna" written on it along with a drawing of a woman with a sad face and two large breasts. This fact was brought to the attention of both TWC and OPPD supervision, but no action was taken. Instead she was told that she was capable of handling the situation and that she should try to become a part of the team.

On March 18 or 19, 1989 Petitioner and her team members attended emergency response training. One of her team members indicated out loud that only those with military training would be required to know the information. Petitioner in response asked the instructor who would need to know the information being taught. OPPD's Karl Karlson who was presiding over the lecture responded that all individuals would need to know it. In response to this one of her team members accused her of having something against the military and of being a know-it-all. Petitioner responded by stating that she had nothing against the military, in fact, several of her family members had been in the military. She then took the opportunity to bring up the cup incident and to state her concerns about whether her team members would be there to back her up if the occasion arose. Upon leaving the room, Mr. Karlson informed Petitioner that the cup incident sounded like sexual harassment to him.

On March 20, 1989 Petitioner was informed by Mr. Karlson that he had called a meeting other TWC and OPPD supervisors to discuss the issue of harassment and the fact that some of the men had taken it upon themselves to put graffiti on the bathroom walls. At trial it was determined that at least some of this graffiti had been directed at Petitioner and other woman.

Sometime during March 22nd through the 24th Petitioner and her team members were conducting a mock hostage negotiations. Petitioner was sent outside the room where the negotiations were being conducted and ordered by one of her co-workers to guard a particular door in the hall way where she could neither hear or see what was going on. When she moved down the hall still keeping the door she was to be guarding in sight so that she could see into the room and hear the process, the co-worker who had ordered her outside the room yelled at her to go back to her post and that she would never be anything other then a "fucking" guard. Just prior to this incident, while they had been practicing outdoor searches, Petitioner was asked to hide along with other officers while others

searched them out, but instead of searching her out she was left hiding until she finally left to return to the training facility where she found her team members began to laugh and snicker at her arrival.

In addition to these incidents, Petitioner was subjected to counseling on the proper use of her radio because her team members had been walking over her transmissions and it was thought she did not know how to use the radio properly.

On March 25, 1989 Petitioner and her team members returned to normal duty. At the end of the shift, OPPD's shift supervisor, Ron Undajon, called a meeting to discuss various problems including the harassment which had been occurring. During this meeting Mr. Undajon discussed the importance of working together as a team and then turned the floor over to Petitioner so that she could address her concerns. Petitioner described the harassment she had been experiencing and was immediately verbally attacked by her team members, including a female officer from another team, who asked her why she should be upset about it if she wasn't. The situation got so bad that Mr. Undajon had to intervene and state that he was not going to allow everyone to attack one person. The meeting ended with everyone angry and upset at Petitioner. After this meeting Petitioner was referred to as Number 11 whenever she was discussed among her team members, and there was no further sexually explicit communications over the intercoms, however, the squeaky chair noises and laughter continued..

TWC's team leader, Mr. Boettger, prepared a memo memorializing the meeting which was distributed to Petitioner's team. The memo simply stated that there was a difference between harassment and humor and that they would all have to take it as well as dish it out. It further stated that focusing on one person was crossing the line to harassment. This memo also advised the team members on the chain of command which was to be the team leader an then the shift supervisor. It did not mention whether it meant the Mr. Jones of TWC or Sgt. Tibbs of OPPD when referring to the shift supervisor. Petitioner had previously been instructed that when it came to safety violations in the Station she was to go directly to her on site supervisor, OPPD's Sgt. Tibbs. No specific instructions were ever given to her about who she should complain to about her sexual harassment claims, however, both OPPD's and TWC's sexual

harassment policies allowed Petitioner to go to her supervisor and then to anyone higher up if the need arose.

Prior to the March 25, 1989 meeting Petitioner had been called on the carpet by Mr. Jones for not going to her team leader with her complaints and that this was a violation of the chain of command. Petitioner informed Mr. Jones that she had informed her team leaders and that they were fully aware of what was going on, but that they had not followed the chain of command and informed him.

Immediately after the March 25, 1989 meeting Petitioner was approached by Mr. Undajon in the parking lot and informed that he felt she could handle the situation and that she was an intricate part of the team. Petitioner asked him for a transfer in that she did not see much hope of being allowed to become a member of the team. In response Mr. Undajon gave Petitioner seven days to go around to each of her team members and ask them what it was about her that they did not like. Petitioner responded that she did not know how this would help the situation, but agreed to do it. Mr. Undajon ended the discussion by telling her that she needed to get more "personal" with her team members. Sgt. Tibbs testified that she felt it was high time for the meeting and that although Mr. Undajon indicated during the meeting that he would not tolerate the type of conduct complained about by Petitioner, there was a lot of tolerance.

The next day Petitioner was again approached by Mr. Undajon and her team leader, Mr. Beottger. It was again stressed that she needed to become a member of the team and that she should work on doing this. Petitioner again stressed the harassment she was experiencing and again requested a transfer which was again denied because it would look bad for him when it came time for raises.

Although the lewd language over the intercoms ended, after the March 25, 1989 meeting, her communications were still being walked on. Additionally, the squeaky chair noise accompanied by the laughter of the men continued over the intercoms. During the last week of her employment she began to be relieved late which in turn caused her to be late in relieving the person at her next post. She was the one accused of being the cause of this problem.

Petitioner attempted to comply with Mr. Undajon's orders to speak to her team members about the problems they were experiencing. She did speak to many of them, however, some made

it difficult. Mr. Alsharabi refused to speak to her altogether. When she spoke to another, Mr. Buckingham, he referred to an incident where she had asked for a second opinion on a question after having already asked him. He indicated he had nothing against her personally and said nothing when she asked him if the problems they were having was because she was a woman. Once Petitioner had seen a strange light in the yard and not being able to identify it asked Mr. Buckingham if he could. Instead of responding in a professional manner, noises about flying saucers and remarks like, "Oh look, there's a flying saucer," came over the radio in a high pitched voice made to sound like a woman.

On April 6, 1989 Petitioner came into work and went to sign in on the pass on log. When she did this she noticed someone had forged her name at the top of the log normally reserved for the supervisor, and that the supervisor had noted on the log, "[d]o not alter face card pictures - it is a reportable incident." Petitioner informed the supervisor, OPPD's Sgt. Tibb's, about her name being forged and asked her what had been done to the face card pictures. Tibbs informed Petitioner that they had been drawing mustaches on them. Although Sgt. Tibbs did not confirm it at the time, Petitioner believed they had drawn the mustache on her face card badge. At trial Sgt. Tibbs confirmed that Petitioner's badge had in fact been defaced.

Petitioner went ahead to her assigned post. While there she heard over the radio that Mr. Alsharabi was being sent into a radiologically controlled area. Upon his exiting the area Petitioner was able to see Mr. Alsharabi wearing gloves of the type that would be worn under protective clothing. By this time Petitioner was suspicious and concerned for her safety as she had been repeatedly sent into radiologically controlled areas and left to stand there to be "crapped up" or exposed to some contamination. This had happened enough times to cause Mr. Alsharabi to joke with her over the radio, "Hey Fred, how come your the one always getting crapped up?" Petitioner was usually following Mr. Alsharabi in rotation when this occurred.

Shortly after Mr. Alsharabi had exited the area, Petitioner was ordered by Sgt. Tibbs to enter the same area. Petitioner was concerned since she had not been scheduled to do foot patrols that day and because earlier that day Mr. Alsharabi had angrily interrupted

some friendly conversation between her and another team member over the intercom saying he did not have to listen to what they were talking about over the intercoms and that it really did not matter since she would not be there much longer. Upon entering the HP corridor Petitioner checked the sign in logs to see if there were any special instructions regarding protective clothing, and noticed someone sitting in the corridor where there was normally no one. Since there were no instructions regarding protective clothing and she had heard Mr. Alsharabi saying he was putting on protective clothing when entering the same area, she rechecked the logs and then reluctantly entered the area. Upon exiting the area the ambient air and the PCM monitors, which indicate when there is a contamination or exposure, began to sound the alarms. The person who had been sitting in the corridor got up and left without speaking to her. Another OPPD officer came down and asked her where she had gone, and then told her to go back to her work area without explaining what had just happened. When Petitioner attempted to sign back out on the sign on log, as was the normal procedure, she was told twice by the OPPD officer not to do so. Petitioner informed Sgt. Tibbs about her concerns about Mr. Alsharabi and requested to be taken out of rotation behind Mr. Alsharabi. It was Petitioner's contentions at trial that she had been intentionally exposed to radiation by Mr. Alsharabi or management or both. Some evidence was presented at trial which indicated that she had in fact suffered some exposure during her employment, and there was not one piece of evidence presented by the Respondents which either denied the incident or explained it.

When she returned to her work area, Petitioner was met by Sgt. Tibbs who asked her whether she was all right and why she had not been sent upstairs. Petitioner was instructed to wait there until a ride could be obtained to take her to her next post. While Petitioner was doing as instructed Mr. Alsharabi called the work area several times demanding to know why she had not relieved him yet. Petitioner finally hung up on him after being instructed to do so by the same individual who had approached her after she set off the alarms. When Petitioner was finally able to relieve Mr. Alsharabi he was so angry at her that he pushed the door into her on the way out without saying a word to her.

After returning to the work area about an hour later, Petitioner was radioed by Mr. Boettger to wait for him there. When

he arrived she was ordered to follow him into an office where he placed a document entitled "Record of Formal Counseling." Before her. It accused Petitioner of violating the chain of command by going to Sgt. Tibbs with her concerns that day, of failing to provide TWC with a contact number, and of failing to follow Mr. Undajon's orders to talk to each of her team members and that any further problems with her team members would result in the filing of aberrant behavior charges against her.

Petitioner attempted to explain that she had provided a contact number, but did not want it given to her team members considering the harassment she had been experiencing on the job, that she did not believe she had gone outside the chain of command, and that she had at least attempted to speak to each of her team members as she had been instructed to do. Petitioner refused to sign the document and asked to speak with Mr. Undajon. Sgt. Tibbs testified that Petitioner was upset, but not out of control during this meeting and that she herself believed the discipline was too severe for the situation. Mr. Beottger indicated in a report he drafted that Petitioner was "totally irrate and irrational."

When Petitioner met with Mr. Undajon she indicated to him that it was not she who should be disciplined, but her team members and refreshed his memory to the fact that it was they who were making it impossible for her to become a team member by their acts of harassment. She also informed him as to the events of the day. In response, Mr. Undajon told her to shut up and threatened her with the deactivation of her badge. When she continued to discuss the problems she had been faced with since beginning training only two months earlier and brought to his attention that she believed the situation had now become a safety hazard within the Station, her badge was deactivated. Her weapon was taken from her and she was escorted out into the hall and instructed to wait for Mr. Jones to arrive. Mr. Undajon wrote up a report in which he accused Petitioner of ranting and raving about "trivial matters, i.e., her name being signed on the Sgts. line on the pass on log - the harassment that was inflicted by her peers" during this meeting.

Petitioner waited without incident for several hours for Mr. Jones to arrive. When he did he had a brief discussion with Mr. Undajon and then returned to her to inform her that he had no choice, but to suspend her pending an investigation since her badge had been

deactivated. Petitioner did her best to attempt to dissuade him from taking this action, but was unable to do so, and finally went home.

Petitioner denied becoming irrate or irrational or of ranting and raving about trivial matters.

On or about March 27, 1989 Mr. Jones conducted an investigation in which he basically asked each of Petitioner's team members whether or not Petitioner was being sexually harassed. Each member said that they had done nothing wrong and that Petitioner brought on her own problems. One team member confirmed the cup incident, but it was not looked into any further.

On April 13, 1989 Petitioner provided her employers a 35 page handwritten statement about many of the problems she had experienced with her team members which she believed to be because of her gender and which had created a hostile environment to the point where she was being intentionally exposed to radiation. There were incidents discussed in this document and the statement prepared by Mr. Undajon regarding what happened during his discussion with Petitioner about the Record of Formal Counseling which were not specifically identified in her EEOC complaint, however, her and which were later however, they were not brought up for the first time at trial.

On May 5, 1989 Petitioner filed her NEOC complaint against TWC. She also filed complaints with the Nuclear Regulartory Commission believing she had been intentionally exposed to radiation in retaliation for her having made her complaints about harassment. Her NEOC complaint was later amended in July to include OPPD.

On May 8, 1989 Petitioner was informed that she would be required to retake the MMPI. Although she was concerned the MMPI would be used against her she decided to take the exam so that she could attempt to return to work.

Petitioner was scheduled to see a Dr. James Burger, a clinical psychologist hired by Respondents, who gave her the second MMPI. The second test was determined to be basically the same as the first, with a few exceptions which Dr. Burger testified could have been due to the fact that Petitioner was under some stress and did not trust him. Dr. Burger testified that he made no determination as to whether Petitioner's claims of sexual harassment were valid, but because of these claims sent her to see a Dr. Caroline G. Sedlacek because she had some experience in dealing with sexual harassment.

Dr. Sedlacek gave Petitioner a Rorschach examination. Neither doctor made a determination as to the truth of her allegations and neither made any actual diagnosis of Petitioner. Based on Petitioner's scores on these exams and using the employers' view of what had been transpiring at work, Dr. Burger made the determination that he could not certify her mentally fit for duty since she did not meet some of the behavioral unreliability criteria required by the Nuclear Regulartory Commission. Drs. Burger and Drs. Sedlacek both indicated they could not base their decision Petitioner did not meet these criteria strictly on the test results, and that they relied on information provided by the employers which they had accepted as truth in coming to their conclusions. Not being able to say whether her claims of sexual harassment and a hostile environment were valid they could not say whether her test results were due to the harassment she was experiencing or not. In fact Dr. Burger testified that he would not have decertified Petitioner solely based on the test results and his interview with her, but then with some prompting from the Judge, changed his testimony to say that he "probably would have...but its hard to say..." In all Dr. Burger said nothing that was inconsistent with Petitioner's claims that she was being sexually harassed at work or that her problems as he perceived them were not directly related to the harassment she was experiencing.

When Dr. Burger refused to certify Petitioner as being mentally fit, she was terminated by TWC.

REASONS FOR GRANTING THE WRIT

I.

WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The court of appeals found there were no errors of law or fact in regards to the trial court's findings that Petitioner had failed to

prove many of her allegations of sexual harassment ever occurred, despite the fact that the record is replete with numerous incidents other then the cup incident which were in fact supported by the evidence.

For example, the trial court was in error as a matter of fact in finding Petitioner had failed to prove that there was lewd language being used over the intercoms. Both Petitioner and several others testified in trial that there was lewd language being used over the intercoms. In fact the testimony was both undisputed and corroborated that in response to Petitioner's complaint on March 13, 1989 about this language a memorandum was issued ordering such language to be terminated on the intercoms. If the intercoms were not working as the court determined there would have been no point in issuing the memorandum. The trial court's conclusion that the intercoms were not even working made in reliance of testimony by Sgt. Tibbs was also clearly erroneous since she did not testify that the intercoms were not working, only that she believed that only two intercoms were working at the time. So long as at least two were working then Petitioner would have on occasion had the opportunity to hear such language. Further, the trial court was in error as a matter of law in determining that even if sexual comments complained of had in fact been made over the intercom, they could not support Petitioner's claims since they were not directed at her. As a matter of law all acts within a claim of a hostile environment need not be directed at the Petitioner in order for her to be able to rely on them. *Hall v. Gus Center Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

Another example of sexual harassment which was indisputably supported by the evidence other then Petitioner's testimony alone, but which the trial court refused to consider was the graffiti in the men's bathrooms. Again there was testimony by other individuals other then Petitioner which support this claim. It is undisputed that such conduct was occurring and that the bathroom had to be closed down to be repainted. It is also undisputed that some of the graffiti was directed specifically at Petitioner, as well as, other woman. Again even if the graffiti was not directed at Petitioner specifically, it would be an error in law to require that the graffiti have been directed at Petitioner in order to be considered an act of sexual harassment. *Id.*

Another example of sexual harassment which was supported by the testimony was the fact that Petitioner's name was forged on the pass on log and that her face card badge was defaced with the drawing of a mustache on it. Although the court had given credence to Sgt. Tibbs statements regarding the intercoms, it without explanation gave no credence to the fact that Sgt. Tibbs' testimony also supported Petitioner's testimony regarding the sign on log and the defacing of her badge. Finally, no testimony was provided to contradict the truth of these acts of sexual harassment.

There is no dispute that Petitioner was the one instructed to go around to her co-workers and find out what it was they did not like about her. Retaliatory counseling and disciplinary actions such as this can as a matter of law be grounds for a hostile environment sexual harassment claim when the employer was aware of the harassment. *Degrace v. Rumsfeld*, 614 F.2d 796, 804 (1st Cir. 1980); *see also Harrison v. Reed*, 603 F. Supp. 1457, 1462 (E.D. Mo. 1985); and *see* EEOC Decision No. YSF 9-108 (1973) CCH EEOC Decisions Para. 6030 (retaliatory counseling, suspension pending investigation, termination or putting the solution to the problem in the hands of the plaintiff can not constitute corrective action on the part of the employer).

In all there were many acts of sexual harassment which were either supported by credible testimony other then Petitioners or were totally undisputed by the Respondents. Considered in total, these acts of harassment were severe and pervasive enough to create a sexual harassment hostile environment as alleged by the Petitioner, and the lower courts were clearly in error.

These are but a few of the many errors of fact and law which the Petitioner argued the trial court had made on appeal and which were all but ignored by the court of appeals. A thorough review of the record unmistakably leaves one with the definite and firm conviction that a mistake has been committed with regard to whether Petitioner suffered from a sexual harassment hostile environment at work. When one is left with such a definite and firm conviction that a mistake has been made, the court of appeals should as a matter of law reverse the trial court's decision. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). By refusing to acknowledge the multitude of clearly erroneous conclusions of fact and law made by the trial court and the court of

appeals failure to remedy these errors, the court of appeals made an error of law which so far departs from the accepted and usual course of judicial proceedings, or merely sanctions such a departure by the lower court such as here, there is a special and important reason to call for an exercise of the Supreme Court's power of supervision.

It is clear there were in fact many clear errors of both fact and law which the court of appeals has sanctioned in the instant case, and it should not be allowed to do so without at least an response to each legitimate argument Petitioner made to the contrary. By simply burying Petitioner's many legitimate concerns in a decision without an opinion, the court of appeals has failed in its duties.

WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

By the court of appeals affirmance of the trial court's opinion that there was no evidence that the Petitioner's suspension or termination was due to anything other then her alleged violations as noted in the Record of Formal Counseling or her reaction to being formally counseled by Beottger, Undajon or Jones on April 6, 1989, the court of appeals has in effect determined as a matter of law that the Respondents may rely on the conduct and mental state of the Petitioner even if that conduct and mental state is caused directly and solely by the sexual harassment which the Respondents are aware of. Justice can not allow this to occur.

At the very least the Respondents were aware of the language over the intercoms, the cup incident, the graffiti, on the wall, and the hostility shown Petitioner during the March 25, meeting. There is no question Respondents were aware of the hostile environment and in fact attempting to solve the problem by requiring Petitioner speak to her team members and try to become a member of the all male team. Being aware of the hostile environment it was error as a matter of law for the lower courts to determine it was all right for Respondent's to refuse to transfer Petitioner and to order her to find out why she was not liked by her team members. When harassment is known to the employer it should not be allowed to throw the problem back in

the hands of the employee and then be allowed to use the employee's inability to solve the problem as an excuse for taking further action against the employee. This is exactly what the lower courts in the instant case have done.

In making this determination the court of appeals has decided an important question of federal law which has not been settled by the Supreme Court, but which should be, i.e, should an employer be allowed to use the reasonable conduct of an employee which is caused by the sexual harassment experienced by that employee, in order to justify its actions against that employee for such conduct? Additionally, the court of appeals has decided this question in such a way that it is inherently unjust to those who would venture to make a complaint about sexual harassment, such as Petitioner, in that it places the burden of solving the problem on the individual being harassed and in effect legitimates retaliatory conduct by the employer, or the Respondent in this case.

Since the Petitioner's reaction to being formally counseled was clearly directly related to the alleged sexual harassment and her complaints of sexual harassment, and clearly would not have occurred but for the sexual harassment and her complaints about it, the Respondents should not be allowed to rely on this conduct to argue it had a justification for suspending her or requesting that she submit to psychological examinations. It should be error as a matter of law for the lower courts to have found that Respondents could meet their burden of proof under a mixed motive case to show they would have suspended or terminated Petitioner even if they would not have considered her gender under these circumstances?

The Petitioner identified and presented evidence in support of several incidents which she contends were acts of sexual harassment by her peers and by her joint employers,[1] and which were directed at

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1 The district court determined there was a fact issue raised as to whether TWC, OPPD, or both entities employed Petitioner, however, it also found resolution of this issue was unnecessary because it did not find a violation of Title VII. Petitioner would argue the determination of this issue was in fact pertinent to the court's determination of whether there was a violation of Title VII since the issue of whether there was joint control over Petitioner and whether she had a dual chain of command, is pertinent to the question of whether Petitioner ever deserved to be counseled for not following the chain of command which in turn is

her because of her gender and/or because of her complaints of sexual harassment. These ranged from the individual acts of harassment by her team members to her termination by the Respondents. Petitioner has argued the totality of all acts complained of, and which occurred within a two month period, were so severe and pervasive that a hostile environment was created within her workplace. The lower courts' findings that Petitioner failed to prove many of these acts of sexual harassment was clearly erroneous as a matter of law in that a review of the record will leave the Court with the definite and firm conviction that a mistake has been committed *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The facts of this case clearly show that the Respondents, instead of taking prompt, effective and remedial action in response to Petitioner's complaints of sexual harassment, denied her a transfer; left it up to her to resolve the problem of the harassment by talking to each of her team members; counseled her on her alleged failures to follow the chain of command in bringing her complaints of harassment and to talk to each of her team members as ordered; suspended her pending an investigation into her complaints when the hostile environment reached the point of actually becoming a safety violation in the Station; accepted the harassers denials of wrong doing at face value during the investigation into her complaints; accused her of being mentally unfit for duty without justification; forced her to resubmit to two psychological examinations; and then terminated her on that basis.

Such actions simply can not be allowed to serve to protect the Respondents from liability. It should be only in those instances in which the employer can show that the conduct and or mental status of the employee was caused by some other factor other then the employer's failure to take prompt, effective and remedial action, that an employer should be allowed to use the employee's conduct and or mental status as the basis for disciplinary action against the employee. Any attempt to use conduct caused by the sexual harassment against

---

pertinent to Petitioner's ultimate claim that her employers not only allowed the hostile environment to exist, but took part in it by failing to take prompt, effective and remedial action thereby becoming part of the hostile environment it knew to exist.

the employee will only serve as yet another incident of sexual harassment in the overall hostile environment claim.

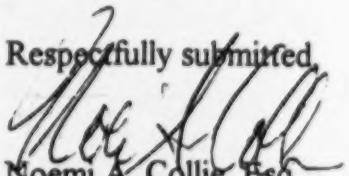
It is crystal clear in the instant case that Petitioner never did anything but seek protection from sexual harassment by her team members and that instead of correcting the situation the Respondents simply becomes a part of the problem and additional harassers.

Along these same arguments it is claimed that the Respondent may not use Petitioner's mental state at the time of her psychological examinations against her unless they can prove such mental state was caused by some other factor other then the sexual harassment and Respondent's failure to remedy it. The facts of this case clearly prevent Respondent from being able to prove Petitioner's mental state at the time of Dr. Burger's and Dr. Sedlacek's evaluation was due to anything other then the harassment she was by this time experiencing from both her team members and her superiors. No diagnosis was made explaining Petitioner's state of mind or test results. No determination was made that Petitioner was not experiencing sexual harassment as she had claimed. Without some evidence that Petitioner was mentally unfit for some reason other then the sexual harassment she has in fact proved to have existed, the Respondent should not be allowed to rely on her mental unfitness as protection for liability against her claim of wrongful termination. But for the sexual harassment of her co-workers, and Respondent's failure to remedy the situation, she never would have been sent to have a psychological exam and she would never have suffered the symptoms the doctors relied upon in coming to the conclusion that Petitioner was mentally unfit. There is no evidence to the contrary. This situation should be treated the same as though Petitioner was suspended and terminated because of her gender since the harassment goes back to the harassment she suffered because of her gender.

CONCLUSION

For all the reasons stated, Petitioner prays that this Court grant a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals to affirm the decision of the trial court.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DONNA FRED,	*	
	*	
Plaintiff,	*	8:CV-90-00734
	*	
VS.	*	
	*	
WACKENHUT CORPORATION and OMAHA PUBLIC POWER DISTRICT,	*	
	*	
Defendants.	*	

This matter was tried to the Court pursuant to 42 U.S.C. Sec. 2000e-5(f)(3), on July 5-8, 11-13, and August 1-2, 1994. After hearing the testimony and examining the exhibits, the Court, pursuant to Fed. R. Civ. P. 52, makes the following findings of fact and conslusions of law.

BACKGROUND

The parties stipulate that plaintiff was hired by the Wackenhut Corporation (TWC) on February 8, 1989, as a nuclear security officer at the Omaha Public Power District's (OPPD) Fort Calhoun Nuclear Power Station (Station). OPPD had contracted TWC to provide security at the station.[1a] Following a four-week training period, plaintiff was certified as a foot patrol and response officer, effective March 6, 1989. However, she lost this status on March 8, 1989, was recertified on March 17, and on April 6, 1989, OPPD withdrew her "unescorted access" to the station until such time as she met certain federal regulatory standards. TWC then suspended plaintiff from duty at the station. Plaintiff was formally served with notice of her

---

1a Because each party appears to have exercised joint control and supervision over the security officers, the issue arises as to whether TWC, OPPD, or both entities employed the guards. Resolution of this issue is unnecessary because the Court finds no Title VII violation.

termination on June 6, 1989, having never returned to work at the station.

After filing complaints with the NEOC and EEOC and receiving their determinations that no violation of Title VII occurred, plaintiff filed this action. The gravaman of her complaint is that during and after her tenure at the Station, she was sexually harassed by her fellow workers and management of both OPPD and TWC. She further claims that despite her reports of the harassment, her employer failed to take prompt remedial action. She alleged that the harassment interfered with the terms and conditions of her employment and ultimately concluded in her termination in violation of Title VII.

DISCUSSION

Before plaintiff's sexual harassment and discrimination allegations are explored in detail, the Court must initially determine the controlling law in this case. Specifically, the Court must first consider what standards to apply to plaintiff's sexual harassment claim and, second, determine the proper legal framework to analyze her Title VII complaint. The Court addresses these issues in order.

SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Sec. 2000e-2(a)(1). The phrase "terms, conditions, or privileges of employment" includes requiring people to work in a discriminatorily hostile or abusive environment. *Meritor Savs. Bank v. Vinson*, 477 U. S. 57, 64 (1986). When a work environment is permeated with "discriminatory intimidation, ridicule, and insult," that is severe or pervasive enough to alter the conditions of the victim's workplace, Title VII is violated. *Id.* at 65; *Harris v. Forlift Sys., Inc.*, ____ U.S. ____, 114 S.Ct. 367, 370 (1993).

To establish a Title VII hostile environment claim based on sexual harassment, plaintiff must how:

(1) she belongs to a protected group;

(2) she was subject to unwelcome sexual harassment;

(3) the harassment was based on sex;

(4) the harassment affected a term, condition, or privilege of employment; and,

(5) the employer knew or should have known of the harassment and failed to take proper action.

Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992)(*Burns I*).

Hostile-environment sexual harassment is actionable under Title VII when it is sufficiently patterned or pervasive. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993). To make such a determination, the Court must consider the totality of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humilitating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, ___ U.S. at ___, 114 S.Ct. at 371. This is not a "mathematially precise test," *Id.*, and the Court should not pigeon-hole each alleged sexually harassing episode and measure the harm occurring in each incident. *Burns I*, 955 F.2d at 564. "[A] discrimination analysis must concentrate not on individual incidents but on the overall scenario." *Id.* (*citing Andrews v. Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

The appropriate standard when evaluating the evidence in hostile environment litigation is that of a reasonable woman under similar circumstances. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 (8th Cir. 1993) (en banc) (*Burns II*). "Thus, behavior a reasonable woman would find objectionable may be actionable even if many people deem it to be harmless or insignificant." *Id.* (citations omitted). Therefore, it is important to note that sexual harassment can occur in many different ways. *Id.* at 964. As the Court stated in *Burns II*, "A female worker need not be propositioned, touched offensively, or harassed by sexual innuendo . . . hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. *Id.* at 964 (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)).

Therefore, the Court must consider all evidence that suggests a hostile work environment. However, only those incidents of unequal treatment of the plaintiff that would not occurr but for the sex of the plaintiff, if sufficiently patterned and pervasive, will be

considered as an illegal condition of employment under Title VII. *Hall v. Gus Constr. Co.*, 842 F.2d 10101, 1014 (8th Cir. 1988) (citing *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C.Cir. 1985)). The Court must carefully walk what the Supreme Court describes as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris*, ___ U.S. at ___, 114 S.Ct. at 370. Behavior or language that merely engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.

MIXED MOTIVES FORMULA[2a]

Plaintiff has not directed the Court to the theory under which she intended to prove her case, i.e., either under the "mixed motives" approach articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or under the "indirect evidence" analysis of *McDonnell Douglas Corp. v. Green*, 411 S.Ct. 792 (1973). The distinction is crucial because of the difference of the burdens of production and proof. Nevertheless, the Court must make a specific finding as to which theory applies to the instant case. *Stacks v. Southwestern Bell Yellow Pages*, 996 F.2d 200 (8th Cir. 1993).

The Court finds that the *Price Waterhouse* mixed motives approach is the appropriate theory for this case. Plaintiff has attempted to produce direct and circumstantial evidence that her gender was a motivating factor in her termination. If plaintiff meets her burden by a preponderance of the evidence, the burden of persuasion shifts to the defendants, who must show that they would have made the same decision even if they had not taken gender into account. *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). If the defendants meet this burden, they avoid liability. *Price Waterhouse*, 490 U.S. at 244-45.

Having resolved the principal legal issues of this case, the Court will now examine plaintiff's specific factual allegations.

ANALYSIS

2a The Court notes that the mixed-motivations defense as applied prior to the enactment of the Civil Rights Act of 1991 is controlling in this case. After the Supreme Court's holding in *Landraf v. USI Film Prods.*, ___ U.S. ___, 114 S.Ct. 1483 (1994), it is well-settled that the 1991 Act does not apply retroactively to claims actionable prior to the Act's enactment on November 21, 1991.

The Court's inquiry begins with the second *Burns I* compenent: whether or not plaintiff was subject to unwelcome sexual harassment. *Burns I*, 955 F.2d at 564. If a finding of sexual harassment is made, then the Court will consider whether that harassment was based on sex, whether it affected a condition of employment, and whether TWC or OPPD knew or should have known of the harassment and failed to take proper action. *Id.*

The Court considers the "overall scenario" when analyzing whether plaintiff's workplace was hostile. *Burns I*, 955 F.2d at 564. However, for convenience plaintiff's allegations are considered as they were presented in plaintiff's complaint to the Nebraska Equal Opportunity Commission and with the Equal Employment Opportunity Commission (Exhs. 103, 104, 105, 106): 1) she was handed a styrofoam cup upon which was written sexually suggestive and offensive language, 2) a co-worker advised her that was suspended because she was "not putting out" and 3) she was suspended pending and internal investigation. In her trial brief and during her testimony, plaintiff discussed several additional incidents of conduct that she alleges constitute sexual harassment. The Court will examine these charges in order.

THE CUP INCIDENT AND OTHER ALLEGATIONS

On March 17, 1989, plaintiff and other security guard trainees were in a training facility on the Station site. At some point plaintiff was presented a styrofoam coffee cup upon which was written the words "Suck my dick Ma-donna" or some such language and equally offensive illustrations. The plaintiff describes her reaction as being "shocked and really disappointed because I felt like I had a lump right in my chest." (Tr. 144).

Other incidents of alleged sexual harassment that occurred before and after the cup incident include a co-worker referring to her as a "civilian" (Tr. 156), being told that she would never be "anything but a fucking guard" (Tr. 163-64), people making distracting noise in the training room (Tr. 515, 519), listening to co-workers make sexist remarks over the Station's intercome system (Tr. 553, 555), being purposely contaminated with radiation, lack of friendly conversation (Tr. 521), hearing the sound of squeking chairs over the intercom (Tr. 551) and general "behind the scenes abuse" (Tr. 510). During her testimony, plaintiff stated that the sexual harassment continued up

until and during the trial itself and plaintiff described the work environment as "day to day harassment" (Tr. 511).

As for the cup incident, the Court concludes that such conduct goes beyond that which is merely offensive, but is instead humiliating and degrading behavior aimed at the plaintiff. The Court acknowledges that the testimony is unclear as to who penned the words and pictures and whether or not plaintiff was handed the cup or if she asked a co-worker if she could see it. Nevertheless, it is unquestionable that the cup existed and that it was inscribed with sexually frank and repugnant material sufficiently offensive to constitute sexua harassment.

Regarding the other allegations, including those raised for the first time at trial but not noted in this opinion, the Court cannot conclude that those incidents constitute sexual harassment. After carefully examining the record and considering the credibility of the witnesses, including the plaintiff's, the Court finds that plaintiff failed to prove that many of her allegations of sexual harassment ever occurred. For those that are supported by some evidence, the Court concludes that they do not rise to the level of sexual harassment as contemplated by the law. For example, other than her bar assertion, plaintiff did not present any evidence to prove a conspiracy existed to intentionally contaminate her with radiation. Another example is her complaint that comments of a sexual nature were made over the intercom system. However, even if they werem, there is no evidence that they were ever directed at plaintiff. Indeed, there was credible testimony that during plaintiff's tenure at the Station the intercom system did not even function (Tr. 926) and, in any event, any derogatory language ceased after a memorandum was circulated by plaintiff's superior, TWC Project Manager Larry Jones, advising the guards that such conversations would not be tolerated (Tr. 1222-23; Exh. 1).

However, it is unnecessary to engage in a detailed discussion as to why each claim fails for lack of evidence because once defendants were aware of plaintiff's sexual harassment charges, defendants took the requisite prompt remedial action. On March 25, 1989, a meeting for plaintiff's co-workers was called by their superiors, OPPD Security Shift Supervisor Ronal Undajon and TWC Team Leader Tim Boettger. At this meeting, a memorandum was circulated that admonished the employees to cease any harassment

(Exh. 22). Plaintiff herself also addressed her co-workers at the meeting and asked them to stop what she considered sexual harassment and that she wanted to be a member of the team (Exhs. 61 & 35). Undajon told the guards that he would not tolerate sexual harassment at the Station (Tr. 173-74).

The Court concludes that this meeting and the accompanying memorandum was proper, effective and sufficient remedial action to stop further sexual harassment and, therefore, TWC and OPPD did take proper action as required by *Burns I*. Indeed the evidence shows that once the defendants were made aware of plaintiff's claims, they called the March 25 meeting and circulated the memorandum and no additional sexual harassment was reported. Although plaintiff argues that the harassment continued after the meeting, there was no credible evidence of continued harassment presented to the Court. Indeed, the effectiveness of the meeting and the memorandum is underscored by plaintiff's own testimony during cross examination. In response to a question concerning why the guards no longer made sexually oriented remarks over the intercom, plaintiff stated "They were afraid to lose their jobs" (Tr. 640).

The Court therefore concludes that but for the cup incident on March 17, no other episodes of sexual harassment occurred at the Station. Consequently, the Court finds that the harassment was not severe or pervasive enough to alter the conditions of the workplace. Furthermore, the Court concludes that any sexual harassment was arrested by the prompt remedial action taken by OPPD and TWC through the March 25 meeting.

PLAINTIFF'S SUSPENSION

Plaintiff alleges that her suspension from duty on April 6, 1989, constitutes sexual harassment. According to plaintiff, on the morning of April 6, she was "counseled" or disciplined by Boettger for her repeated failure to follow the organizational chain of command, for not providing TWC with a contact telephone number, and for her failure to meet with her fellow team members as she had been instructed to do. He presented her with a "Record of Formal Counseling" (Exh. 36), a form of disciplinary report, detailing these problems for her signature. Plaintiff denied the allegations, refused to sign the report and threatened to give it to the Better Business Bureau (Exh. 37). Plaintiff alleges that Boettger repeatedly

"hollered" at her to "shut up" and would not listen to her excuses for the violations included in the report (Tr. 212-221).

Plaintiff contends that she then went to talk to Undajon, who, according to plaintiff, read Boettger's counselling form, told plaintiff to "shut up" and had her removed from his office by two guards (Tr. 224). Undajon "deactivated" her security badge, which effectively terminated her unescorted access to the Station.

Finally, Jones was advised by Undajon that plaintiff's badge was deactivated. Jones then told plaintiff that she was suspended pending an investigation and that she should go home (Tr. 228).

During her conversation with Boettger, Undajon and Jones, plaintiff contends that she behaved in a quiet, straightforward and professional manner.

However, according to Boettger, plaintiff refused to follow instructions to sit down and she became "totally irrate [sic] and irrational" and began to rant (Exh. 22). Undajon noted that when he spoke to plaintiff she was "uncontrollable, that she was yelling, and that she would not sit down and discuss the problem, [and] she started 'ranting and raving'" (Exh. 101 p. 9). In her meeting with Jones, plaintiff was argumentative, insubordinate and refused to accept Jones' decision to suspend her because OPPD deactivated her badge. (Tr. 1229, Exh. 32).

Plaintiff claims that this series of events, including the actual suspension from her position, constitutes a cognizable sexual harassment claim.

The Court recognizes that sexual can occur in many ways other than through explicit sexual advances, *Burns II*, 989 F.2d at 964. However, even if the Court accepts plaintiff's version of the events on the morning of April 6, 1989, the Court must still conclude that there is no evidence to support the contention that plaintiff's suspension constituted sexual harassment. There is absolutely nothing in the record to even suggest that the deactivation of her badge and her eventual suspension were motivated by anything other than the violations noted in the Record of Formal Counseling and her behavior during her meetings with Boettger, Undajon and Jones. Although plaintiff may not feel that the violations in the Record of Formal Counseling were justified, this Court is not the forum to debate the judgment of plaintiff's superiors. The record is replete with evidence that plaintiff's behavior on April 6, and not sexual

harassment, made it incumbent upon TWC and OPPD to disarm and remove plaintiff from the Station.

SEXUAL PROPOSITIONS

Finally, plaintiff alleges that another episode of sexual harassment occurred in April 10 -- four days after her suspension -- when a former co-worker, Arthur L. Marr, advised her during a telephone conversation that she was having problems at work because she was "not putting out." She also claims that he stated that "him [sic] and his wife had an open relationship and that their relationship was such that they had 'casual sex' and he was suggesting that I have casual sex" (Tr. 315-16).

No corroborating evidence or testimony was adduced at trial other than her lone accusations. Marr himself emphatically and categorically denied that he propositioned or otherwise discussed sex with plaintiff (Tr. 289-90). The Court finds that plaintiff's claims regarding Marr are wholly unsubstantiated.

In addition, plaintiff claims that this conversation occurred many days after her suspension while she was at home. There is no evidence of any improper remarks or conduct by Mr. Marr at the workplace. In fact, the plaintiff and Mr. Marr were on different teams. Even accepting the notion that the exchange occurred, the Court finds that Marr's alleged sexual proposition did not affect her in her workplace.

For these reasons, the court concludes that plaintiff's allegations against Marr are not credible nor relevant to the issues and they will therefore not be considered as an episode of sexual harassment.

PLAINTIFF'S TERMINATION

It is important to note that even if the Court concluded that plaintiff was successful in showing that gender played a part in her suspension and subsequent termination, under the rule articulated in *Price Waterhouse*, the Court would be obligated to find for the defendants. Thus, even if plaintiff met her burden, defendants would avoid liability if they demonstrated that they would have made the same decision even if they had not taken gender into account. *Price Waterhouse*, 490 U.S. at 244-45.

This burden could be easily satisfied by defendants. Under 10 C.F.R. Sec. 73, App. B, specific physical and mental standards are

required by the Nuclear Regulartory Commission. That Part states, in pertinent part:

> 2. Mental qualifications:
>
> b. Armed individuals and central alarm station operators . . . shall have no emotional instability that would interfere with the effective performance of assigned security job duties. The determination shall be made by a licensed psychologist or psychiatrist, or physician, or other person professionally trained to identify emotional instability.

After plaintiff's suspension on April 6, she underwent a psychological examination conducted by a licensed clinical psychologist, Dr. James M. Burger, Ph.D. He prepared a profile of plaintiff which concluded that she had (1) Argumentative Hostility Toward Authority, (2) Adverse Reaction to Stress, and (3) Emotional and Personal Inadaptability (Exh. 88). His findings were confirmed by a collegue, Dr. Caroline G. Sedlacek, Ph.D., who concluded that "Mrs. Fred cannot handle the type of responsibility and team work required at the nuclear plant . . . . I supppose one could build a strong case for a mixed personality disorder." (Exh. 87). On the basis of his conclusions and those of Dr. Sedlacek, Dr. Burger would not certify plaintiff was competent to discharge her duties as an armed security officer (Exh. 38). Consequently, plaintiff was terminated on June 8, 1989.

Thus, pursuant to 10 CFR Sec. 73 App. B, plaintiff was unfit for duty and TWC's only option was to terminate her as an armed security officer at the Station or risk violating the Nuclear Regulatory Commission's rules. Therefore, even if plaintiff had met her burden, the evidence established that they would have terminated her.

CONCLUSION

For these reasons, the Court finds that plaintiff has failed to established her claim that she was subject to a discriminatorily hostile or abusive work environment or that her gender played a part in defendants' decisions which led to the termination of her employment. A separate order will be entered in accordance with this memorandum opinion.

DATED this 15th day of August, 1994.

BY THE COURT:

s/Lyle S. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-3346NE

Donna Fred,	*	
	*	
Appellant,	*	
	*	Appeal from the United
VS.	*	States District Court for
	*	the District of Nebraska
Wackenhut Corporation; Omaha	*	
Public Power District,	*	(UNPUBLISHED)
	*	
Appellee.	*	

Submitted: April 10, 1995
Filed: May 4, 1995

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

After a bench trial, the district court rejected Donna Fred's Title VII hostile environment claim based on sexual harassment. On appeal, Fred argues that most of the district court's findings are clearly erroneous. Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We further conclude the district court's fact findings are not clearly erroneous and no error of law appears. We thus affirm the judgment of the district court. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-3346NE

Donna Fred,	*	
	*	
Appellant,	*	8:CV90-734
	*	Appeal from the United
VS.	*	States District Court for
	*	the District of Nebraska
Wackenhut Corporation; Omaha	*	
Public Power District,	*	(UNPUBLISHED)
	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 4, 1995.

A true copy.

ATTEST: s/Michael E. Gans
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.
MANDATE ISSUED
May 25, 1995

Copies mailed on 6-2-95.

(2)

Supreme Court, U.S.
FILED
AUG 24 1995
CLERK

No. 95-212

In The

Supreme Court of the United States

October Term, 1995

DONNA FRED,

Petitioner,

vs.

THE WACKENHUT CORPORATION
and OMAHA PUBLIC POWER DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT, THE WACKENHUT CORPORATION'S, RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a petition for writ of certiorari point out any perceived misstatements in the petition. Respondent, The Wackenhut Corporation (TWC), believes that one of many misstatements contained in the petition appears in the second "Question Presented" in the petition.

Although Petitioner asserts that her conduct and mental state, which was the basis for TWC's decision to suspend and terminate her, would not have occurred but for the allegations of sexual harassment brought by Petitioner, the trial court and the Eighth Circuit Court of Appeals simply found that Petitioner's conduct and mental state had no relation to any alleged sexual harassment or charges of sexual harassment presented by Petitioner. The courts below specifically found that, as required by law, TWC, upon learning of the one and only incident of sexual harassment directed against Petitioner, took prompt, remedial, and appropriate corrective action. *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 370 (1993); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405-06 (1986). Moreover, this issue did not involve a question of law that was decided by the courts below, but rather a fact finding by the lower courts.

In her third "Question Presented," Petitioner alleges that the courts below made incorrect factual determinations by deciding that TWC took prompt, remedial, and appropriate corrective action. However, the courts below

QUESTIONS PRESENTED – Continued

did not find, as asserted by Petitioner, that Respondents responded as asserted in Petitioner's "Questions Presented" number 3. The courts below found that Respondents issued a memo promptly after learning of the alleged sexual harassment incident to all employees, warning them not to make slanderous or harassing comments. Further, TWC made a prompt investigation after complaints made by Petitioner. Such investigation was adequate and was conducted by employees of TWC who lived and worked outside of the state of Nebraska, where the alleged discriminatory acts took place. Moreover, TWC held a meeting on March 25, 1989, with Petitioner present, in which all employees were warned not to harass any other persons. TWC issued a memo that same day stating that employees were not to harass other persons. Petitioner was present at the March 25, 1989 meeting and was able to say what was on her mind. Significantly, Petitioner *admits* that no alleged harassment occurred after March 25, 1989.

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No. 95-212

In The

Supreme Court of the United States

October Term, 1995

DONNA FRED,

Petitioner,

vs.

THE WACKENHUT CORPORATION
and OMAHA PUBLIC POWER DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT, THE WACKENHUT CORPORATION'S, RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Another misstatement is found in Petitioner's "Statement of the Case" section of the Petition. On page 5 of her Petition for Writ of Certiorari, Petitioner states that no action was taken by Respondents to the one instance of sexual harassment that was proved and found to be true by the courts below. This statement is false. The courts below specifically found that: a prompt investigation was conducted into the allegation of sexual harassment; two memoranda were issued warning all employees not to

harass any other employees; a meeting was held among all employees who worked with or around Petitioner, and in which Petitioner attended and was allowed to assert her allegations of sexual harassment; and in the meeting, all employees were warned not to harass anyone.

All of the alleged facts contained in Petitioner's "Statement of the Case" section of her Petition are no more than bald assertions of sexual harassment, which the trial court found to be false. Other than one incident, the allegations asserted by Petitioner that were found to be true by the courts below were deemed not to constitute sexual harassment. The courts below determined that after the one incident, Respondents took prompt, remedial, and appropriate corrective action after learning of the harassing incident.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit Court of Appeals is proper. The decisions of the Eighth Circuit and the trial court were factually based. Although Petitioner asserts that the courts below decided questions of law incorrectly, the whole basis of her Petition for Writ of Certiorari is that the trial court and the appellate court incorrectly decided purely factual issues.

Throughout her petition, Petitioner asserts that the trial court made incorrect factual findings and incorrect credibility determinations.

Therefore, it is clear that the decisions of the trial court and the court of appeals were factually based so

that none of the reasons for a grant of certiorari as stated in Supreme Court Rule 10 are present in this case.

ARGUMENT

I. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Without citing any case law, constitutional law, or statutory authority, Petitioner asserts that the Eighth Circuit Court of Appeals departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner has failed to show how the Eighth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings. Petitioner does no more than assert that the Eighth Circuit Court of Appeals, by affirming the trial court, should have decided factual issues in her favor.

Petitioner points to no errors of law that were made. Petitioner asserts that there were errors of fact *and law* made by the trial court and the Court of Appeals, but fails to point out any alleged errors of law committed by either of the courts below.

Petitioner does no more than request the Court to review factual determinations made by the trial court and the Court of Appeals so that the allegedly mistaken factual determinations can be corrected. For example, under her first reason for granting certiorari, Petitioner states that "the trial court was in *error as a matter of fact* in

finding Petitioner had failed to prove that there was lewd language being used over the intercoms."

The following quotes from the Petition illustrate the purely factual basis for Petitioner's Petition. Petitioner asserts that "another example of sexual harassment which was indisputably *supported by the evidence other than Petitioner's testimony alone*, but which the trial court refused to consider was the graffiti in the men's bathrooms." In the next paragraph, Petitioner asserts that "another example of sexual harassment which was *supported by the testimony* was *the fact* that Petitioner's name was forged on the pass-on log and her face card badge was defaced with a drawing of a mustache on it." In the next paragraph, Petitioner asserts that "there is no dispute that Petitioner was the one instructed to go around to her co-workers and find out what it was they did not like about her." She asserts that this instruction was retaliatory counseling and disciplinary action. The trial court, *in a finding of fact*, found that such instruction by the Respondent to the Petitioner was not retaliatory nor disciplinary. In the next paragraph, Petitioner asserts that "in all, there were many acts of sexual harassment which were either *supported by credible testimony* other than Petitioner's or were totally undisputed by the Respondents."

This Court is not a fact-correcting court. *See Fay v. Noia*, 372 U.S. 391, 436, 83 S.Ct. 822, 847 (1963). It does not sit to correct alleged factual mistakes made by lower courts. There are no special and important reasons, whether under Rule 10 or not, for the Court to grant Petitioner's Petition for Writ of Certiorari. There is no evidence, supporting case law, constitutional law, or statutory law supporting Petitioner's allegations that the

Eighth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings.

II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT DECIDE A QUESTION OF FEDERAL LAW

Petitioner asserts that the Court of Appeals' affirmance of the trial court's opinion that there was no evidence that Petitioner's suspension or termination was due to anything other than her violations of company rules and procedures was a determination of a question of federal law by the Eighth Circuit Court of Appeals.

Petitioner fails to assert any question of federal law which was decided by the Eighth Circuit Court of Appeals. Petitioner asserts in her Petition for Writ of Certiorari that the trial court made a "no evidence" determination. In other words, Petitioner asserts that there was a factual determination by the lower courts that there was no evidence that Petitioner's suspension or termination was due to anything other than her violations of company rules and procedures. Petitioner points to no statutory law or case law that was changed or given a new interpretation by the courts below. There was no new creation of federal law by the Eighth Circuit Court of Appeals. Petitioner does no more than assert that the trial court and the Eighth Circuit Court of Appeals made incorrect factual determinations.

Petitioner further asserts that the alleged question of law decided by the Court of Appeals and which should be determined by this Court is: whether an employer should be allowed to use the reasonable conduct of an

employee, which is caused by a sexual harassment experience by that employee, in order to justify its actions against an employee for such conduct. Petitioner misstates what the Court of Appeals and the trial court found. The lower courts determined that Petitioner's conduct was not reasonable. They found that Petitioner's conduct was not caused by any sexual harassment. They found that there was no sexual harassment. They found that Respondents took no retaliatory or disciplinary actions against Petitioner. They found that there were no acts, other than one, that constituted sexual harassment. The courts below found that upon learning of the one incident of sexual harassment, Respondents took prompt, remedial, and appropriate corrective action.

Petitioner assumes facts that were not proven at trial and that the trial court specifically found were not credible. These assumed facts were found to be false and incredible by the courts below. Therefore, Petitioner does no more than assert that the courts below made incorrect factual determinations. She then asserts that if the courts below had made "correct" factual determinations, then a question of law was decided based upon these *assumed* facts.

Petitioner next argues that the trial court made an incorrect factual determination in deciding that Respondents took prompt, remedial, and appropriate corrective action after learning of the one incident of sexual harassment. She further argues that there were other acts of sexual harassment. The courts below found that such incidents did not occur. Petitioner then states that the courts below are incorrect because there were witnesses

other than Petitioner that testified to these sexual harassment acts. However, this is simply asserting that the trial court and the Court of Appeals made incorrect credibility determinations. There is no showing that the courts below made determinations of law.

Petitioner concludes her argument under her second reason for granting certiorari by asserting that TWC should not be allowed to use Petitioner's mental state at the time of her psychological examinations against her unless it can prove such mental state was caused by a factor other than the sexual harassment and TWC's failure to remedy it. This assertion points out Petitioner's real argument: because she was allegedly sexually harassed, her mental state was unstable, which in turn caused her to lose her job. However, the trial court specifically found that Petitioner was not sexually harassed and, but for one incident, any of Petitioner's allegations that were credible did not constitute sexual harassment. Therefore, Petitioner's argument must fail because at least one of the facts she assumes was found not to be true by the trial court.

Petitioner states no special and important reasons for granting her Petition. Accordingly, the Court should deny Petitioner's Petition for Writ or Certiorari.

III. NO ARGUMENT IN SUPPORT

Although Petitioner presents three questions to the Court, she presents argument under only the first two. Petitioner does not present any argument under her third question presented. Therefore, Petitioner has waived any

arguments or claims for relief under her third question presented.

Even if Petitioner's third question presented is considered by the Court, the third question presented is nothing more than an allegation that the trial court made an incorrect factual determination. The trial court found that Respondents took prompt, remedial, and appropriate corrective action in response to Petitioner's complaints of sexual harassment. Petitioner claims that such actions on the part of the Respondents were not prompt, remedial, and appropriate corrective action. These are purely factual arguments that fail to meet the requirements of Supreme Court Rule 10.

The Court should deny Petitioner's Petition for Writ of Certiorari because she attempts to enlist the Court in correcting the allegedly mistaken factual determinations made by the courts below. Petitioner shows no special and important reasons for granting the Petition as required by Supreme Court Rule 10.

CONCLUSION

None of the considerations for the grant of certiorari set forth in Supreme Court Rule 10 are present in this case. The courts below have resolved factual matters on overwhelming evidence. There is no conflict of circuit court decisions. The federal statutory law in this area is clear and was not disturbed by either the trial court or the Eighth Circuit Court of Appeals. Neither court below made any new question of law determinations that have not been settled or ruled upon by the Court. Petitioner

has therefore failed to sustain her Rule 10 burden of establishing special and important reasons justifying the grant of writ of certiorari.

Accordingly, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-212

In The

Supreme Court of the United States

October Term, 1995

DONNA FRED,

Petitioner,

vs.

WACKENHUT CORPORATION AND
OMAHA PUBLIC POWER DISTRICT,

Respondents.

**On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals
For The Eighth Circuit**

BRIEF OF RESPONDENT OMAHA PUBLIC POWER DISTRICT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has presented three issues for review. First, she claims that the district court's decision, and the affirmance of that decision by the Eighth Circuit Court of Appeals, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Second, Petitioner claims that the district court and the court of appeals have created new and erroneous law allegedly allowing Respondents to rely on the Petitioner's mental state as a basis for their decision to suspend and terminate her when, in the Petitioner's opinion, such mental state was brought on by the underlying sexual harassment.

Third, Petitioner claims that the district court's finding that prompt effective remedial action was taken with regard to the single event which was credited by the Court was not, in fact, prompt and effective remedial action.

Pursuant to Sup. Ct. R. 15, Respondent OPPD notes that there are numerous misstatements, not only of the facts, but of the nature and effect of the findings of the district court. Those misstatements will be addressed in some detail in the Statement of the Case. Regardless, each of the three questions presented, when Petitioner's argument is examined, amount to no more than Petitioner's disagreement with the specific credibility determinations and findings of fact made by the district court and affirmed by the court of appeals.

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DONNA FRED,

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Respondents.

**On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals
For The Eighth Circuit**

BRIEF OF RESPONDENT OMAHA PUBLIC POWER DISTRICT IN OPPOSITION

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In a decision reported at 860 F. Supp. 1401 (D. Neb. 1994), the Honorable Lyle E. Strom, then Chief United States District Judge for the District of Nebraska, following a trial to the court, found in favor of Respondents, and against Plaintiff/Petitioner. Petitioner filed a Notice of Appeal on September 14, 1994, and following oral argument, the Eighth Circuit Court of Appeals rendered its per curiam decision (unpublished) on May 4, 1995,

affirming the decision of the district court. *Fred v. Wackenhut*, 53 F.3d 335 (8th Cir. 1995).

The Petition for Writ of Certiorari was timely filed by Petitioner on August 1, 1995. Respondent acknowledges the jurisdiction of this Court to review the Petition for Writ of Certiorari, and does not dispute the Petitioner's Statement of Statutes Involved.

Respondent does note that the appendices to the Petition do contain the relevant opinions; however, there are numerous typographical errors within those reproduced opinions. None of those typographical errors affect, however, the substance of the opinions, which, in the case of the district court opinion, is separately published.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition of Case Below

This case, alleging hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended, began with the filing of an administrative charge of discrimination with the Nebraska Equal Opportunity Commission and the federal Equal Employment Opportunity Commission. Those charges of discrimination set forth a total of four instances of alleged sexual harassment. That list of allegations grew significantly from that time until the time of the filing of the original Complaint in this matter on November 9, 1991. Thereafter, allegations regarding

instances of sexual harassment continued to grow during the discovery process, during trial in this matter, and, in fact, there were even issues of harassment raised for the first time on appeal before the Eighth Circuit Court of Appeals.

The trial commenced on July 5, 1994, continued on July 6 through 8, July 11 through 13, and August 1 through 2 and concluded on August 2, 1994. On August 15, 1994, the district court rendered its decision in favor of the Defendants Wackenhut and OPPD. Plaintiff filed a Notice of Appeal on September 14, 1994, and on May 4, 1995, the Eighth Circuit Court of Appeals held, in an unpublished per curiam opinion:

> After a bench trial, the district court rejected Donna Fred's Title VII hostile environment claim based on sexual harassment. On appeal, Fred argues that most of the district court findings are clearly erroneous. Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We further conclude the district court's fact findings are not clearly erroneous and no error of law appears. We thus affirm the judgment of the district court. See Eighth Circuit R. 47B.

Petitioner's Appendix B.

Petitioner now seeks review of this Court with the basic premise being, once again, that the trial court erred in its findings of fact; an issue specifically reviewed and rejected by the Eighth Circuit Court of Appeals.

2. Statement of Facts

The Petition contains a number of misstatements of fact. The position of Petitioner in the matter now before the Court, and the position of the Petitioner before the Eighth Circuit Court of Appeals, simply put, was that the district court erred in not believing her.

It is clear that the district court reviewed all of the evidence before it, listened carefully to the Petitioner's testimony and that of her witnesses (all of whom disagreed with her testimony in large measure), and made specific credibility determinations regarding the matters now raised by her. In fact, the Petitioner herself testified for almost one-half of the trial. While it is clear that plaintiff's factual representations are unsupported by any evidence, or were specifically rejected by the trial court, for the sake of brevity, only a few examples will be addressed here.

The Wackenhut Corporation ("Wackenhut") is a corporation organized and existing under the laws of the State of Florida and is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The Omaha Public Power District ("OPPD") is a political subdivision of the State of Nebraska and is engaged in the business of providing electrical power. OPPD operates the Fort Calhoun Nuclear Station ("FCNS"), a nuclear power generating facility. In accordance with the strict regulations issued by the Nuclear Regulatory Commission ("NRC"), FCNS must be protected by a highly trained security force.

In December of 1988, OPPD and Wackenhut entered into a contract under which Wackenhut was to begin providing nuclear security services at OPPD's FCNS. Under the terms of the contract, Wackenhut was responsible for furnishing, among other things, the labor, and the supervision and training of that labor, within the guidelines of the NRC. During all times pertinent to this action, the security force at FCNS was comprised both of Wackenhut guards and of guards still employed by OPPD.

Wackenhut began its security operations at FCNS in February of 1989. Petitioner began her nuclear security training in February of 1989. She was in training for one month and worked on site at FCNS from only March 6, 1989 through April 6, 1989. Petitioner was an active security guard at FCNS for a total of only sixteen days.

On April 6, 1989, Petitioner was denied access to the FCNS by OPPD because her behavior was in violation of the Fitness for Duty Standards for an armed nuclear security guard under 10 C.F.R § 73; that is, she exhibited aberrant behavior, and became, quite simply, uncontrollable. As a result of that outburst, Petitioner was placed on suspension and was later sent to two different psychologists to determine her ongoing fitness for duty. Both psychologists, who testified at trial, indicated that Petitioner could not continue in her employment as an armed security guard and Petitioner was formally terminated.

Petitioner first interviewed for the security officer job at Wackenhut with Larry Jones (a Wackenhut supervisor on-site at FCNS) in February of 1989. At trial, Petitioner testified that this meeting constituted the first instance of

sexual harassment. Curiously, in the pretrial order, the Petitioner had stipulated that the first act of sexual harassment did not occur until late March of 1989. In any event, Petitioner complained that Mr. Jones had jokingly told a male applicant, in her presence, to "hurry up and get his application in" or he would make the Petitioner a supervisor before the applicant. Petitioner conveniently neglects to tell the Court that Mr. Jones denied that this exchange (which could hardly be classified as harassment) ever took place.

From her hire date of February 5, 1989 until March 6, 1989, Petitioner was in training with other officers, both male and female, who were hired by Wackenhut to work at FCNS. From the outset, Petitioner experienced performance difficulties with the job, and difficulties getting along with both male and female co-employees. After receiving a failing mark on the first and second phase of NGET training (which includes the radiation and contamination section of the training), Petitioner had to be retrained and retested. During this period, Petitioner alleged at trial that she was harassed in a number of ways. Again, this directly contradicted her stipulation in the Pretrial Order that no harassment occurred prior to late March of 1989.

Petitioner alleges that a training officer yelled "old lady" at her on the firing range, an allegation raised for the first time at trial, and an allegation on which Petitioner offered no corroborating evidence. Petitioner also complained of loud noises and yelling during the training sessions, which she testified was bothersome to all trainees, but which she characterized as harassment being directed at her.

On March 6, 1989, after completing approximately four (4) weeks of training, Petitioner and other team members were assigned to perform actual security duties. Petitioner, however, had continuing problems with adequately performing her duties. Of her own volition, Petitioner approached an OPPD supervisor and acknowledged that she still needed more training because she did not feel comfortable with her knowledge of the security doors. On March 8, 1989, *based on Petitioner's request*, she was decertified as a foot patrol and response officer and sent back to training. She was, contrary to her characterization here, given a good deal of help by co-employees in retraining.

As a result of this decertification, and in accordance with Wackenhut's policy, Petitioner's wages were temporarily reduced to the training rate, which she had previously received. Petitioner posits that this pay decrease was sexual harassment. However, the testimony established not only that this was a policy, but also that all other security officers, including males, had their pay reduced to training wage when they were sent back for *individual* retraining. Petitioner also alleged that Mr. Jones, in explaining the temporary change back to the training wage stated that there was no such thing as being "partially pregnant", i.e. that she was either certified as an officer or was a trainee – not both. Again, Petitioner ignores the fact that Mr. Jones denied making this statement.

Petitioner next stated that lewd remarks were made over the intercom referring to a woman's body parts. Although asked repeatedly, Petitioner did not and could not provide any specific instances when a co-worker

talked about body parts, nor was there any corroborating testimony about the other alleged intercom statements. Petitioner also stated that squeaky chair noises were made by males over the intercom. Petitioner could not point to dates, times, or who was involved, nor did she explain why such noises were even considered by her to be harassment.

Petitioner also pointed to a memo which addressed the employees about the use of intercoms and stated that inappropriate language would not be tolerated. There was absolutely no evidence at trial that the language prompting the memo was of a sexual nature, that such language was directed at Petitioner, or that Petitioner had complained about it. Again, Petitioner had stipulated that the harassment about which she complained did not start until late March of 1989. The trial court also found that there was credible evidence that the intercom system was not operational at the times plaintiff had complained about its use.

Petitioner alleges that she was sexually harassed by Hafez Alsharabi, a Wackenhut guard and a former Kuwaiti citizen, who confirmed in a conversation that "yes, women in Kuwait are treated as second class citizens" and "walk behind men." The evidence established that this conversation was simply a factual discussion by Mr. Alsharabi in response to specific questions he had received from both male and female employees, and was not meant to be demeaning in any way.

The only incident which the District Court credited was the so-called cup incident. In a meeting attended by some of the guards, a styrofoam cup was circulated with

a drawing of a stick figure with breasts and some writing on the cup. Although the evidence was never clear as to what exactly appeared on the cup, the district court found that indeed the cup incident had occurred. The district court found, however, that this single incident, was not sufficiently severe or pervasive to rise to the level of sexual harassment under Title VII. Even if it did, the district court found, after listening to all of the evidence, that prompt and effective remedial action was immediately undertaken by both OPPD and Wackenhut.

Petitioner contends that the action taken by OPPD and Wackenhut was not appropriate remedial action, because it allegedly required her to work out the situation on her own. Petitioner again completely mischaracterizes the facts. In fact, a meeting was held at which it was made clear that no harassment would be tolerated by either Wackenhut or OPPD. In fact, Petitioner even testified that, following that meeting, no further harassment occurred because her co-employees "were afraid to lose their jobs."

Petitioner's characterization of the request that she approach her co-workers and try to work out personal problems was completely unrelated to the issue of sexual harassment. Petitioner had a number of problems getting along with co-employees. For example, when she would ask another guard for advice, the guard would give her such advice and she would reject it as being wrong.

Petitioner pointed at trial to a number of other issues which were totally unsupported by the evidence or, if

supported, were not, by any stretch of the imagination, harassment.

For example, the Petitioner was involved in anti-terrorist response training and was placed in a hallway as a guard during a hostage training exercise. Petitioner did not feel that her assignment was important enough and took it upon herself to essentially leave her post in order to find out what everyone else was "up to." She, in fact, was yelled at by a co-worker because of these actions.

Petitioner also points to a circumstance in which a mustache was painted on her identification card. Petitioner once again conveniently omits the fact that mustaches were painted on the I.D. badges of a number of other guards, most of whom were male.

Petitioner also claims that there was graffiti in the men's bathroom of a sexual nature. The only evidence of such graffiti was after Petitioner had been terminated – and that material was immediately removed.

Perhaps the most farfetched is her allegation that OPPD and Wackenhut, as part of this alleged pattern of sexual harassment, deliberately exposed Petitioner to radiation. That allegation is not only ridiculous, but was totally unsupported by *any* evidence at trial.

Following Petitioner's suspension for aberrant behavior, she was sent to two different psychologists, both of whom came to the conclusion that Petitioner could not be an armed security officer at a nuclear power

plant – she was not fit for such duty. Neither psychologist, both of whom were called by Petitioner at trial, indicated that Petitioner's underlying psychological problems had anything to do with the alleged sexual harassment.

Again, Petitioner's ever-expanding allegations regarding sexual harassment were, to the extent that they were communicated at the time of the trial, heard by and analyzed by the trial court who made specific credibility determinations. Petitioner's Petition, in a nutshell, seeks a review of a clearly fact-intensive case which was decided by the trial court and reviewed in detail by the Court of Appeals. There is no reason for this Court to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

Generally, certiorari will not be granted to review judgments based solely on questions of fact. The judgment in this case was obviously fact-intensive. Specific credibility determinations, especially those relating to Petitioner, were made by the trial judge. The Petitioner argues that the findings of fact of the district court were clearly erroneous and should have been reversed by the United States Court of Appeals for the Eighth Circuit. She bases this argument (as she based her circuit court appeal) on the simple fact that she does not agree with the findings of the district court, and that, therefore, they must be clearly erroneous. However, the evidence, when viewed in its entirety, clearly supported the findings of the district court, and the affirmance of the Eighth Circuit

Court of Appeals. The Eighth Circuit was required to, and properly did, affirm the district court decision. Petitioner's position that the district court and circuit court opinions "departed from the accepted and usual course of judicial proceedings" is untenable.

Petitioner next mischaracterizes the holding of the district court in an attempt to advance her second basis for granting this Petition; that is, that the district court held that an employer may rely upon the mental state caused by hostile environment sexual harassment to justify a termination. To the contrary, the district court first found that the evidence did not support a claim of hostile environment sexual harassment and that the one incident which the court did credit, that is, the so-called "cup" incident, was promptly and effectively dealt with. Therefore, there having been no sexual harassment, sexual harassment could not have caused the mental condition which led to Petitioner's termination. In addition, the court specifically held, based upon fact testimony and psychological testimony, that Petitioner's termination and the aberrant behavior that led to it, was wholly unrelated to her claims of sexual harassment.

The third question presented under this Petition involves the prompt and effective remedial action taken by Respondents once they learned about the complaints regarding the cup incident. Petitioner again mischaracterizes the evidence indicating that the action taken by Respondents was simply to tell Petitioner to work it out on her own. In fact, the evidence supports, and the trial court found, that both prompt and effective remedial action was taken. The request that Petitioner visit with her co-workers regarding personal problems was wholly

unrelated to the issues of sexual harassment. Therefore, it is clear that the decisions of the trial court and of the court of appeals were factually supported and were based upon clearly established standards for the review of hostile environment sexual harassment cases under Title VII of the Civil Rights Act of 1964.

None of the reasons for the grant of certiorari stated in Sup. Ct. R. 10 are present in this case.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari in this Court is not a matter of right, but a matter of judicial discretion. Sup. Ct. R. 10. Rule 10.1(a) provides, in pertinent part, that review on certiorari may be appropriate in the following circumstances:

> (a) When a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

Sup. Ct. R. 10. As will be discussed below, neither the foregoing circumstances or any other circumstances

which would necessitate a review by this Court are present in this case.

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DID NOT DEPART FROM ANY ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, NOR DID IT SANCTION SUCH A DEPARTURE BY THE LOWER COURT.

Petitioner argues that the Eighth Circuit has so departed from the accepted and usual course of judicial proceedings by refusing to reverse the factual findings of the district court which determined that Petitioner had failed to prove that she had been subjected to hostile environment sexual harassment. The fact of the matter is that the Petitioner simply does not agree with the district court's factual findings.

Generally, certiorari will not be granted to review judgments based solely on questions of fact. *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 208 (1939). In fact, Petitions which have been granted will be dismissed if it is discovered that the issue involves merely an appreciation of the evidence. *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918). Because the issue in this case is the propriety of the district court's factual findings given the evidence presented at trial, this case is not an appropriate one for exercise of this Court's discretionary review.

The district court found, after hearing the evidence presented at trial and making the necessary credibility

determinations, that Petitioner failed to prove that she had been subjected to sexual harassment. The one incident that the court found to have occurred, the "cup incident," was not sufficiently severe and pervasive to create a hostile working environment. Thus, the district court found that Petitioner was not sexually harassed nor did her discharge have anything to do with her gender. These findings were made in the context of the standards set forth in *Harris v. Forklift Sys., Inc.*, ___ U.S. ___, 114 S. Ct. 367 (1993), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

The court of appeals affirmed the findings of the district court, applying the clearly erroneous standard in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). As this Court held in *Anderson*, "a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573. In *Anderson*, this Court reversed the decision of the court of appeals, which had reversed the decision of the district court finding that discrimination had occurred. This Court determined that the court of appeals had misapplied the clearly erroneous standard.

The clearly erroneous standard does not allow a reviewing court to reverse a lower court's factual findings even if it is convinced that it would have decided the case differently. *Id.* The function of the reviewing court is not to decide factual issues de novo. *Id.* Rather, if the lower court's account of the facts is plausible in light of the record viewed in its entirety, then the reviewing court may not reverse the decision. *Id.* at 574. If there are two

permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.* In addition, determinations based on credibility demand even greater deference. *Id.* at 575.

Here, the district court made factual findings and credibility determinations which were supported by the evidence. Petitioner's contention, simply stated, is that, because conflicts exist between her testimony and the facts as ultimately found by the district court, those finding are clearly erroneous. Petitioner has consistently ignored all of the evidence which conflicts with hers, as well as all of her own testimonial inconsistencies, and basically takes the position: "Everyone but Petitioner is a liar."

These differences between the trial court's findings and Petitioner's testimony do not represent any failure on the part of the district court to consider all the evidence; rather, the district court made specific findings of credibility of the witnesses and evidence before it. Petitioner was given every opportunity to tell "her story." In fact, Petitioner testified for almost half of the trial. Moreover, all of the witnesses she called on her behalf contradicted Petitioner's testimony.

The Eighth Circuit, in a discrimination case where the court sits as the trier-of-fact, held: "We are required to give 'due regard' to the trial court's opportunity to judge the credibility of witnesses, Fed. R. Civ. P. 52(a), and we have stated that we will only reverse a decision based on an assessment of credibility in 'exceptional circumstances'." *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716, 717 (8th Cir. 1985), *citing NLRB v. Iowa Beef Processors, Inc.*,

675 F.2d 1004, 1006 (8th Cir. 1982) (holding that findings based on credibility determinations will not be overturned unless they shock the conscience). Petitioner failed to demonstrate any such exceptional circumstance. She argues only that because the district court agreed with one of Petitioner's allegations, "the cup incident," it would be inconsistent not to believe her as to other instances of alleged harassment. In fact, the so-called cup incident is the *only* incident for which Petitioner had any corroborating testimony; although even that testimony was inconsistent.

Petitioner insists that the trial court made faulty findings of credibility and contends that no witness produced either by herself or by Respondents was credible. Petitioner selects pieces of testimony from particular witnesses which she demands the trial court accept as credible and then demands that the trial court reject the remaining testimony of these witnesses.

The Fifth Circuit, in dealing with mushrooming evidence such as that presented here refused to disturb credibility determinations made by a trial court:

> At trial, Carmon raised a plethora of new allegations of sexual harassment. These allegations kept expanding during direct examination, cross examination, and even redirect examination. Eventually, the district court concluded that Carmon was not credible regarding these new allegations.

Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994) (per curiam).

It is this evidence that the district court considered and upon which it based its determination that Petitioner had failed to prove any hostile environment sexual harassment. The Eighth Circuit, in reviewing the district court's findings and the record as a whole correctly determined that the findings of the district court were not clearly erroneous and thus, properly affirmed the decision of the district court. There is certainly no indication that the Eighth Circuit "so far departed from the accepted and usual course of judicial proceedings" or "sanctioned such a departure by the lower court" as to justify this Court's granting certiorari in this case.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The Petitioner's second basis for this Petition is that the lower courts decided a question of federal law which has not been, but should be, settled by this Court. Specifically, Petitioner alleges that the Eighth Circuit, in affirming the district court's decision, held that an employer may rely on an employee's conduct or mental state to justify its actions, when that conduct or mental state was caused by the discrimination of which the employee complains. However, the Petitioner mischaracterizes the lower courts' decisions.

The district court determined that Petitioner's suspension and resulting termination were due to the behavior exhibited by Petitioner which rendered her unfit to

perform her job. Thus, the district court found that Petitioner's gender did not play any part in the decision to suspend or discharge her.

The district court also stated as follows:

> It is important to note that even if the Court concluded that plaintiff was successful in showing that gender played a part in her suspension and subsequent termination, under the rule articulated in *Price Waterhouse*, the Court would be obligated to find for the defendants.

Fred v. Wackenhut Corp., 860 F. Supp. 1401, 1408 (D. Neb. 1995) *citing Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court then went on to explain that Petitioner's mental state rendered her unfit under federal regulations to work as an armed security officer in a nuclear power station. Clearly, this mixed-motive finding by the district court is merely dictum given the district court's specific finding that Petitioner had failed to meet her burden of proving hostile environment sexual harassment claim.

Furthermore, even assuming that the district court had rendered a "decision" regarding this issue, in her characterization of the decision made by the district court, Petitioner makes the assumption, unsupported by any evidence, that her conduct and mental state were caused by the alleged sexual harassment. There was no evidence presented which would support such a finding. Indeed, the evidence that was presented, and the findings of the district court with regard to the incidents alleged to have occurred by Petitioner, clearly support the opposite finding, i.e. that Petitioner's mental state existed (and exists) independently of anything that occurred in the

workplace. Thus, the district court clearly *did not* decide that an employer can rely on the conduct or mental state of an employee, caused by discrimination on the part of the employer, to justify actions taken against the employee. What the district court *did* decide, based on psychological testimony, is that Petitioner's conduct and mental state (which were unrelated to her claims) justified her immediate suspension and later termination.

Petitioner also argues that the district court, and the Eighth Circuit in affirming the decision of the district court, erred in holding that the Respondents took prompt and effective remedial action after Petitioner complained of alleged sexual harassment. This argument is contrary to the evidence presented in this case. Upon learning of Petitioner's complaint, Respondents held a meeting after the cup incident and issued a memorandum to her co-workers in which it was clearly stated that any harassment was to cease immediately and would not be tolerated. There was no credible evidence presented which would support a finding that any alleged harassment (again, none but the "cup" was credited) continued after the meeting. Clearly, Respondents took appropriate steps to address the concerns of Petitioner regarding alleged sexual harassment and the district court so found based on the evidence presented.

Petitioner's allegation that the remedial action amounted only to a request that she handle the situation is unsupported by the record. The request that Petitioner communicate with her co-workers was unrelated to her complaints of alleged sexual harassment.

CONCLUSION

The only issue in this case is the propriety of the factual findings made by the district court in a case where it was the fact finder. The district court and the court of appeals analyzed this case in the context of *Meritor* and *Harris*, and made specific findings based thereon. It is clear that factual findings cannot be reversed by a reviewing court unless they are clearly erroneous. The Eighth Circuit correctly applied this clearly erroneous standard and affirmed the decision of the district court.

The decision of the Eighth Circuit does not, in any way, depart from the usual and standard course of judicial proceedings so as to justify this Court's exercise of its discretionary power of review. Rather, it comports in all respects with the standards that the court was required to follow.

In addition, contrary to Petitioner's position, no decision of federal law was made which has not been, but should be, settled by this Court.

Therefore, Respondent OPPD respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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